

BEFORE THE PUBLIC SERVICE COMMISSION OF NEBRASKA

In the Matter of the Commission on its own)	Docket No. NG-0051/
motion, to investigate jurisdictional)	PI-130
issues pertaining to construction and)	
operation of a natural gas pipeline within)	
the State of Nebraska by Nebraska)	
Resources Company, LLC, or any other)	
entity.)	

COMMENTS OF SOURCEGAS DISTRIBUTION LLC

Formal Intervenor SourceGas Distribution LLC ("SourceGas") submits the following comments in response to the Commission's Order Opening Investigation and Notice of Hearing entered on July 24, 2007 ("Commission's Order"):

I. Background

On July 16, 2007, the Commission received a letter from attorneys representing Nebraska Resources Company, LLC ("NRC") (hereinafter, "NRC Letter"). The NRC Letter informed the Commission that NRC intends to seek a certificate of convenience from the Commission 'to operate as a "jurisdictional utility" a new natural gas pipeline wholly within the state of Nebraska (the "NRC Pipeline") to deliver natural gas to local distribution companies ("LDCs") and other customers in Central Nebraska.' The NRC Letter also posed three questions to the Commission, which NRC identified as "jurisdictional" questions that needed to be answered "before NRC can proceed with filing a proposed Application to construct and operate the NRC Pipeline under the jurisdiction of the Commission." For ease of reference, the NRC Letter is attached hereto as Exhibit 1.

The Commission's Order sets forth the three questions posed by NRC, and adds a fourth question. The four questions on which the Commission seeks comments from interested parties are as follows:

1. Does the definition of "high-volume ratepayer" in *Neb. Rev. Stat. Sec. 66-1802(7)* include LDCs with volumetric demand in excess of 500 therms per day?
2. Does Nebraska's double-piping prohibition under *Neb. Rev. Stat. Sec. 66-1852* apply to a pipeline providing a new interconnection to an LDC?
3. Does the Commission have jurisdiction over an Application under *Neb. Rev. Stat. Sec. 66-1853(1)* for a Certificate of Public Convenience to operate as a

"jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?

The Commission's Order states that persons wishing to become a party should do so by filing a petition for intervention or protest in accordance with the Commission's Rules of Procedure, establishes September 7, 2007 as the deadline for the submission of comments on the above-referenced questions, and sets a hearing date of September 25, 2007 at 1:30 p.m.

SourceGas provides natural gas at retail in the states of Colorado, Nebraska and Wyoming. SourceGas serves approximately 94,000 customers located in the western two-thirds of Nebraska through an extensive network of natural gas mains and related infrastructure and is the natural gas local distribution company, or LDC, for approximately 180 municipalities in Nebraska. SourceGas is a "jurisdictional utility" within the meaning of the State Natural Gas Regulation Act ("Act"). SourceGas provides natural gas service to many high volume gas customers in Nebraska, including ethanol plants. On August 27, 2007, SourceGas filed with the Commission its Petition of Formal Intervention in this docket.

II. Comments of SourceGas

A. Procedural Matters.

First, SourceGas notes that NRC has provided very few facts regarding its plans to construct and operate the NRC Pipeline in Nebraska. SourceGas is concerned that the Commission is being asked to respond to NRC's putative "jurisdictional" questions in a factual vacuum. A brief review of the NRC Letter generates many questions, but few answers in light of the dearth of facts provided by NRC. For instance, what customers does NRC plan to serve with its proposed pipeline, other than the local distribution company serving the municipalities identified in its letter? What impact would NRC's service have on the jurisdictional utilities that provide service in those areas? What, if any, existing natural gas infrastructure already exists to serve customers in the areas that NRC plans to serve with its proposed pipeline? In SourceGas' view, these and other factual matters need to be explored before the Commission can adequately respond to the questions posed by NRC.

Second, NRC's public pronouncements on the proposed pipeline raise questions as to NRC's position on the scope of the Commission's jurisdiction over NRC's planned operations in Nebraska. Attached to these Comments as Exhibit 2 is a "Presentation to Prospective Shippers" that was printed from NRC's website. Page 6 of that Presentation suggests that the regulatory approval process for the pipeline will involve both this Commission and the Federal Energy Regulatory Commission ("FERC"). Specifically, NRC states in the Presentation that "After construction [of the pipeline], NRC may seek limited FERC Regulatory approval for the Non-LDC load on the pipe." SourceGas is not familiar with the concept of "limited FERC Regulatory approval" for an intrastate pipeline such as the one proposed by NRC in Nebraska. In SourceGas' view, if NRC elects to proceed with this project and apply for a certificate of public convenience from the Commission, its pipeline, which will be located wholly within the State of Nebraska, must be subject, wholly and not partially, to the Commission's jurisdiction. As noted in SourceGas' response to Question No. 2 below, this jurisdiction explicitly includes the Commission's enforcement of the Act's double piping prohibition, if NRC duplicates any existing LDC infrastructure or service. The Commission should not accept limitations on its ability to regulate, as a jurisdictional utility, the construction and operation of the NRC Pipeline in Nebraska.

Third, NRC appears to be seeking a declaratory order from the Commission, although NRC does not cite to *Neb. Rev. Stat. § 84-912.01*, the section of the Nebraska Administrative Procedure Act ("APA") that governs declaratory orders. Under § 84-912.01, the Commission is authorized to issue a declaratory order when two separate requirements have been satisfied, as follows: (1) every "necessary party" (defined in the statute as a person whose rights would be substantially prejudiced by an adverse declaratory order) has consented in writing to issuance of the declaratory order; and (2) the request for a declaratory order addresses "the applicability to specified circumstances of a statute, rule, regulation, or order" of the Commission. It is unclear from the NRC Letter whether there are any "necessary parties" who must consent to the issuance of a declaratory order, but such parties could include jurisdictional utilities such as SourceGas and Aquila. If the record is deficient to disclose such necessary parties, and the Commission or NRC fails to obtain the consent required by § 84-912.01, then the response requested by NRC from the Commission may violate the APA. Furthermore, although the questions posed by NRC in the NRC Letter refer to sections of the Act, nevertheless, as noted above, there are few facts to

enable the Commission to discern whether the second prong of § 84-912.01--"the applicability to specified circumstances of a statute, rule, regulation, or order"--has been satisfied.

For all of the foregoing reasons, SourceGas submits that the Commission should require NRC to proceed with the customary application process established in the Act and the Commission's rules, rather than respond to the NRC questions without adequate factual development.¹

B. Comments on Questions in Commission's Order.

1. Does the definition of "high-volume ratepayer" in *Neb. Rev. Stat. Sec. 66-1802(7)* include LDCs with volumetric demand in excess of 500 therms per day?

Section 66-1802(7) of the Act defines a "high-volume ratepayer" as "a ratepayer whose natural gas requirements equal or exceed 500 therms per day as determined by average daily consumption." Under § 66-1810 of the Act, the rates and terms and conditions of service negotiated with high-volume ratepayers are not subject to the Commission's jurisdiction. The Commission may require the filing of contracts between jurisdictional utilities and high-volume ratepayers. *Neb. Rev. Stat. § 66-1810(1)*.

Based on the limited information provided in the NRC Letter, SourceGas does not believe that the Act's definition of high-volume ratepayer applies to a local distribution company taking service from the proposed NRC Pipeline. However, if the Commission agrees, SourceGas submits that it must make it clear in any order issued herein that a LDC which takes service from the NRC Pipeline nevertheless will remain subject to the Commission's rate regulation and that there cannot be service directly from the NRC Pipeline to jurisdictional customers of a LDC.

2. Does Nebraska's double-piping prohibition under *Neb. Rev. Stat. Sec. 66-1852* apply to a pipeline providing a new interconnection to an LDC?

The Act's double-piping prohibition, Section 66-1852(1), states as follows:

Except as provided in Sections 57-1301 to 57-1307 as those statutes govern jurisdictional utilities and metropolitan utilities districts, **no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has existing natural gas utility infrastructure** or where a contract has been entered into for the placement of natural gas utility infrastructure. (emphasis added)

¹ Due to the lack of facts before the Commission, SourceGas reserves the right to submit additional comments as additional facts are presented to the Commission.

This prohibition, which applies not only to regulated natural gas public utilities but also to all other persons, "public or private", is a cornerstone of the Act and is based on a sound legislative policy to avoid wasteful and duplicative utility infrastructure. Section 66-1852 became part of the Act through the adoption of AM2035, a comprehensive amendment to Legislative Bill 790 (which became the Act) that followed extensive negotiations among interested stakeholders.

Despite the clarity of this legislative pronouncement, the NRC Letter discusses certain cases which address the transportation of natural gas in interstate commerce and suggests that there could be an "imminent possibility of a collision" between the Nebraska Act's double piping prohibition and the Federal Energy Regulatory Commission's jurisdiction. SourceGas submits that the principles of federal preemption recited by NRC do not implicate the Act's double piping prohibition. To the contrary, the United States Supreme Court has ruled that, by enacting the federal Natural Gas Act, Congress occupied only a part of the field of natural gas regulation and observed that "[d]irect sales for consumptive use were designedly left to state regulation." *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329, 334 (1951).

Consistent with the clear and unequivocal language of § 66-1852, SourceGas submits that the proposed pipeline described in the NRC Letter will not violate the Act's double piping prohibition, *as long as* NRC does not duplicate existing local distribution company infrastructure or service. If it attempts to do so, then § 66-1852 must be enforced by the Commission.

3. Does the Commission have jurisdiction over an Application under *Neb. Rev. Stat. Sec. 66-1853(1)* for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

The Commission's response to Question No. 3 involves the application of the following sections of the Act:

1. Certificate of public convenience. Section 66-1853(1) of the Act states, in relevant part, as follows: "No jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the Commission that public convenience will be promoted by the transaction of the business and permitting the applicants to transact the business of a jurisdictional utility in this state."

2. Definition of jurisdictional utility. Section 66-1802(10) of the Act defines a "jurisdictional utility" as follows: " ... a natural gas public utility subject to the jurisdiction of the Commission. Jurisdictional utility does not mean a natural gas public utility which is not subject to the jurisdiction of the Commission pursuant to Section 66-1803."

3. Definition of natural gas public utility. In relevant part, Section 66-1802(11) of the Act defines a "natural gas public utility" as follows:

" . . . any corporation, company, individual, or association of persons or their trustees, lessees, or receivers, that owns, controls, operates, or manages, except for private use, any equipment, plant, or machinery, or any part thereof, for the conveyance of natural gas through pipelines in or through any part of this state. . . Natural gas public utility does not include any gas gathering system or interstate pipeline."

The question, then, is whether NRC is a "jurisdictional utility" within the meaning of the Act's certificate of convenience provision, Section 66-1853(1). First, under the clear meaning of Section 66-1802(11), NRC is a "natural gas public utility" because it is a "company" that proposes to operate "equipment" to convey natural gas in Nebraska. Second, NRC is not excluded from this definition as an "interstate pipeline" because, as stated in the first paragraph of the NRC Letter, the proposed pipeline will be constructed "wholly within the state of Nebraska." Third, NRC is not exempt from the definition of "jurisdictional utility" under Section 66-1802(10) of the Act because its proposed operations in Nebraska do not meet all three of the conditions to be exempt under Section 66-1803 of the Act. Therefore, SourceGas submits that NRC qualifies as a jurisdictional utility that must obtain a certificate of public convenience from the Commission to construct and operate the proposed NRC Pipeline.

As noted in Section II.A. of these Comments, SourceGas is concerned that NRC appears to be hedging its bets with respect to the scope of the Commission's jurisdiction over its planned operations in Nebraska. See Exhibit 2. In SourceGas' view, if NRC elects to proceed with this project and apply for a certificate of public convenience from the Commission, then the Commission should not accept limitations on its ability to regulate, as a jurisdictional utility, the construction and operation of the NRC Pipeline, which will be located wholly within the state of Nebraska.

- 4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the proposed NRC Pipeline, and what is the scope of their review?**

SourceGas supports the Commission's efforts to determine whether other regulatory authorities would have jurisdiction over the proposed NRC Pipeline. As noted in its comments on Question No. 3 above, SourceGas believes that this pipeline, located wholly in Nebraska to serve only Nebraska customers, should be subject to the full range of Commission jurisdiction. Based on the scant information available to date, SourceGas is concerned that NRC may obtain a certificate of public convenience to construct the pipeline, but then attempt to preclude the Commission from truly exercising that jurisdiction on the grounds that service through the pipeline is governed by the FERC. The Commission should be wary about issuing a certificate of public convenience only to have NRC contend that its actual sales to customers in Nebraska are regulated by FERC, not by the Commission. Consistent with its comments in Section II.A, SourceGas submits that the scope and extent of the Commission's jurisdiction over NRC and the NRC Pipeline would be better fleshed out and determined in a formal Application proceeding.

Dated this 7th day of September, 2007.

Respectfully submitted,

SOURCEGAS DISTRIBUTION LLC,

By: 

Stephen M. Bruckner #17073
Russell A. Westerhold #22498
FRASER STRYKER PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663
(402) 341-6000

Bud Becker #15346
Vice-President-Regulatory Law
SOURCEGAS DISTRIBUTION LLC
370 Van Gordon Street, Suite 4000
Lakewood, CO 80228
(303) 763-3496

Attorneys for SourceGas Distribution LLC

CERTIFICATE OF SERVICE

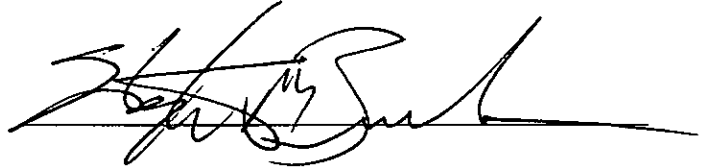
On this 7th day of August, 2007, a true and correct copy of the foregoing Comments of SourceGas Distribution LLC was sent by U.S. Post Office mail to:

Loel P. Brooks
Brooks, Pansing, Brooks, PC, LLO
1248 "O" Street, Suite 984
Lincoln, NE 68508

TJ Carroll
Kinder Morgan Interstate Gas Transmission
370 Van Gordon Street
Lakewood, CO 80228

Roger P. Cox
Harding & Shultz
800 Lincoln Square
121 South 13th Street
Lincoln, NE 68508

Douglas J. Law
Blackwell Sanders Peper Martin LLP
1620 Douglas Street, Suite 2100
Omaha, NE 68102

A handwritten signature in black ink, appearing to read "Douglas J. Law", written over a horizontal line.

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BROOKS, PANSING BROOKS, PC, LLO

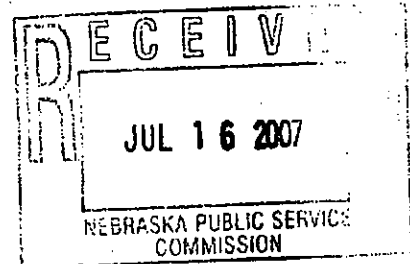
Attorneys At Law

1248 "O" Street, Suite 984
Lincoln, Nebraska 68508-1424

Telephone (402) 476-3300
Facsimile (402) 476-6368

July 16, 2007

Andrew S. Pollock
Executive Director
Nebraska Public Service Commission
1200 N Street, Suite 300
Lincoln, NE 68508



Re: Nebraska Resources Company, LLC

Dear Mr. Pollock:

Nebraska Resources Company, LLC ("NRC") is a limited liability company formed under the laws of the State of Nebraska. NRC proposes to seek a certificate from the Nebraska Public Service Commission ("Commission" or "Nebraska P.S.C.") to operate as a "jurisdictional utility" a new natural gas pipeline wholly within the state of Nebraska (the "NRC Pipeline") to deliver natural gas to local distribution companies ("LDCs") and other customers in central Nebraska.

Three threshold "jurisdictional" questions must be resolved before NRC can proceed with filing the proposed Application to construct and operate the NRC Pipeline under the jurisdiction of the Commission. Accordingly, NRC requests the Commission to institute an Investigation pursuant to Neb. Admin. Reg. Title 291, Chapter 1, Section 012.01 respecting the following three questions:

1. Does the definition of "high-volume ratepayer" in section 2(7) of the Nebraska State Natural Gas Regulation Act ("SNGRA"), NEB. REV. STAT. § 66-1802(7) (2006), include LDCs with volumetric demand in excess of 500 therms per day?¹
2. Does Nebraska's "double piping" prohibition under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), apply to a pipeline providing a new interconnect to an LCD?
3. Does the Commission have jurisdiction over an Application under SNGRA section 53(1), NEB. REV. STAT. § 66-1853(1) (2006), for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

¹ The SNGRA defines a "high-volume ratepayer" as "a ratepayer whose natural gas requirements equal or exceed five hundred therms per day as determined by average daily consumption." SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006).

A. BACKGROUND

NRC proposes to construct a new pipeline to serve growing demand for natural gas service in central Nebraska, including burgeoning demand from new and expanding ethanol plants. The NRC Pipeline project is directly responsive to the state of Nebraska's policies promoting development of improved infrastructure to support the growing ethanol industry in Nebraska. The NRC Pipeline would also provide the local distribution company serving the cities and towns of Aurora, Bradshaw, Hampton, York, Columbus, David City, Osceola, Rising City, Schuyler, Shelby and Garrison, Nebraska, access to competitively priced natural gas supplies and improved reliability of service associated with a second source of gas supplies.

Because 100% of the gas supplies transported by the NRC Pipeline will be received from an interstate pipeline, the transportation service provided by the NRC Pipeline will be transportation "in interstate commerce" notwithstanding that all of the gas is transported solely within the state of Nebraska. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950). Accordingly, the NRC Pipeline *could* be constructed under certificate authority issued by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.* (2005). However, in response to *East Ohio Gas Co.*, Congress amended the NGA by creating the so-called "Hinshaw exemption," 15 U.S.C. § 717(c) (2005), under which a pipeline that would otherwise be subject to federal regulation is exempt from regulation under the NGA if, among other requirements not at issue, the pipeline's *rates* are "subject to" state regulation. 15 U.S.C. § 717(c) (2005). Accordingly, if the rates charged by the NRC Pipeline are subject to regulation by the Nebraska Public Service Commission, the NRC Pipeline would be exempt from federal regulation.²

NRC believes that due to the essentially local nature of the service NRC proposes to provide to customers in Nebraska, the NRC Pipeline *should* be regulated primarily by the Nebraska Commission rather than the FERC. To that end, NRC proposes to file an Application for a Certificate of Public Necessity pursuant to section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate the NRC Pipeline as a jurisdictional utility subject to regulation by the Nebraska Commission.³

However, several threshold jurisdictional questions must be resolved before NRC can proceed with the contemplated Application. Due to the dates by which several of NRC's

² At least to the extent of the services that are rate regulated by the Nebraska Commission.

³ If granted a certificate of public convenience to operate the NRC Pipeline as a jurisdictional utility whose rates for service to customers (other than high-volume ratepayers) are subject to regulation by the Nebraska Commission, NRC proposes to seek a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007) to transport natural gas "in interstate commerce" on behalf of such high-volume ratepayers. Under 18 C.F.R. §§ 284.224(e) and 284.123(b)(1) (2007), NRC's rates for service to these high-volume rate payers will be determined by reference to NRC's state-regulated rates for "comparable service" to state-regulated customers.

potential customers need NRC's service to commence and the lead times required to obtain required regulatory approvals and complete construction of the pipeline, NRC requests a preliminary determination of the three threshold questions stated above. NRC requests these preliminary determinations on an expedited basis in order that NRC may file a timely application with the FERC for a certificate of public convenience and necessity under the NGA if the Nebraska Commission should decline to assert jurisdiction over the NRC Pipeline and the rates it charges to local distribution companies, municipal distribution systems and other non-exempt ratepayers.

B. PROPOSED RESPONSES TO JURISDICTIONAL ISSUES.

1. Does the definition of "high-volume ratepayer" include LDCs with volumetric demand in excess of 500 therms per day?

If the NRC Pipeline's rates to LDCs are subject to regulation by the Nebraska Commission, the NRC Pipeline will qualify as a Hinshaw pipeline exempt from federal regulation. The threshold question therefore in determining whether the NRC Pipeline will qualify as a Hinshaw pipeline is whether LDCs are "high-volume ratepayers" as defined in the SNGRA.

High-volume ratepayers are ratepayers whose daily "requirements" exceed 500 therms per day. SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006). The ratepayer's "requirements" are in turn determined by reference to the ratepayer's average daily "consumption," *i.e.*, the average daily quantity of gas "consumed" by the ratepayer. Consumption is "the use of a thing in a way that thereby exhausts it." Black's Law Dictionary 312 (Bryan A. Garner, *et al.* eds., 7th ed. 1999). An LDC does not "consume" the gas it purchases or transports (except, perhaps, some incidental consumption to fuel compressors used in the operation of the LDC's system). Rather, LDCs resell the gas to retail end-users for consumption by them. Because an LDC does not consume the gas, it has no daily "requirement" *within the meaning of the statutory definition* of high-volume ratepayers which ties "requirements" to "consumption" and, therefore, NRC believes that LDCs are not high-volume ratepayers under the SNGRA.

Supporting this conclusion is the fact that LDCs have always been considered jurisdictional utilities under SNGRA and not high-volume ratepayers. *See, e.g.*, Application No. NG-0007, Order Accepting Aquila, Inc. d/b/a Aquila – Lincoln's Tariff, *Aquila, Inc. d/b/a Aquila – Lincoln*, (2003); Application No. NG-0004.1, Order Granting Application, *Aquila, Inc. d/b/a Aquila Networks (Aquila), Omaha*, (2005). Indeed, if LDCs were deemed to be high-volume ratepayers, the rates charged by LDCs to retail consumers would be exempt from the Nebraska P.S.C.'s jurisdiction due to the statutory exemption from regulation by the Nebraska Commission of high-volume ratepayers themselves, SNGRA § 10(1), NEB. REV. STAT. § 66-1810(1) (2006), and not merely the rates charged to them. *See* Application No. NG-0019, Order (2004). Such a result would undermine the ability of the Nebraska P.S.C. to achieve its statutory mandate of protecting retail customers from unreasonable rates and charges for natural gas service provided by LDCs and is fundamentally inconsistent with the structure and purposes of the SNGRA.

The legislative intent behind section 10 of the SNGRA, SNGRA § 10, NEB. REV. STAT. § 66-1810(1) (2006), is that the term high-volume ratepayer will apply to *end users* of gas. The logic behind the high-volume ratepayer exception is that large end users purchase enough gas and are sophisticated enough to reach their own bargain with natural gas public utility companies, and therefore, these users do not need state protection in the form of natural gas regulation. Floor Debate for 2003 Leg. Sess. 7602 (Ne. 2003) (During the legislative debate on LB 790, Senator Landis describes high-volume ratepayers as “really, really big, big users, who are very adroit—let’s say Nucor Steel, at covering their costs.”). This intention that high-volume ratepayers refer to end users and not LDCs is seen throughout the legislative debate on LB 790. On March 27, 2003 when discussing the high-volume ratepayer exception, Senator Landis refers to “large customers, like ethanol plants” as being the high-volume ratepayer this provision is meant to exempt. Floor Debate for 2003 Leg. Sess. 3047-3048 (Ne. 2003). Consequently, LDCs would not qualify as high-volume ratepayers.

REQUEST: Based upon the foregoing, NRC requests the Commission to affirm that LDCs are *not* “high-volume ratepayers” within the meaning given such term under section 2(7) of the SNGRA, NEB. REV. STAT. § 66-1802(7) (2006).

2. Does Nebraska’s “double piping” prohibition apply to a pipeline providing a new interconnect to an LDC?

An equally important threshold issue is whether Nebraska’s prohibition against “double piping” under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), applies to a new pipeline interconnect to an LDC already served by an interstate pipeline. If the prohibition were to apply to the proposed NRC Pipeline’s service to LDCs in Nebraska, no purpose would be served by NRC filing an Application with the Commission to operate as a jurisdictional utility. Rather, if the prohibition were found applicable, NRC’s only option would be to seek a certificate of public convenience and necessity from the FERC, after receipt of which federal pre-emption principles would preempt Nebraska’s double piping prohibition.

The NGA conferred exclusive jurisdiction upon the FPC, and later, FERC, over the transportation of natural gas in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954). Congress intended for the field of wholesale interstate sales and interstate transportation to be regulated exclusively at the federal level. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 514-516 (1947); *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 305-06 (1988) (“*ANR*”). It is well settled that the NGA occupies the field of interstate transportation to the exclusion of state regulation. *ANR*, 485 U.S. at 306.

In *ANR*, the Michigan Public Service Commission (“MPSC”) sought review of the Sixth Circuit’s holding that the NGA pre-empts Michigan Act 144, which requires a public utility to obtain MPSC approval before issuing long-term securities. When an action is not expressly pre-empted, the Court evaluates whether the action “amounts to a regulation in the field of gas

transportation and sales for resale that Congress intended FERC to occupy" to determine if the action is pre-empted. *ANR*, 485 U.S. at 304.

The MPSC explained the purpose of Michigan Act 144 is to (i) prevent overcapitalization, which could threaten reasonable rates, (ii) prevent a company from taking on so much debt that it is unable to maintain its Michigan facilities properly, and (iii) prevent a utility from raising its equity to a level that will result in higher rates. *Id.* at 307. Because "the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority," *id.* at 308, the Supreme Court held that the NGA pre-empted Act 144. *Id.* at 310. Additionally, the Court stated that "[o]ur conclusion that Act 144 seeks to regulate a field that the NGA has occupied also is supported by the imminent possibility of collision between Act 144 and the NGA." *Id.* at 309.

Similarly in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, Panhandle Eastern Pipe Line Co. ("Panhandle") received a certificate of public convenience from FERC to by-pass Michigan Consolidated Gas Company ("MichCon") and provide gas directly to National Steel Corporation ("National Steel"). *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989) ("*Michigan*"). MichCon argued that Panhandle should be enjoined, because Panhandle could not deliver gas to National Steel without the Michigan P.S.C.'s approval.

The Sixth Circuit held that Panhandle's sale to National Steel was interstate transportation of gas and not local distribution, *Id.* at 1300; therefore, the only question left was whether federal law pre-empted state law. Relying on *ANR*, the court held that "this case involves the imminent possibility of a 'collision' between state and federal regulatory power that would disrupt this comprehensive scheme;" because if the MPSC denied Panhandle's by-pass, then state and federal regulations would be in conflict. *Michigan* 887 F.2d at 1301. Consequently, the court held that the NGA pre-empted MPSC regulation. *Id.* at 1302. As the facts and the holding in *ANR* and *Michigan* show, if the NRC is forced to seek FERC jurisdiction over the NRC Pipeline in order to avoid the consequences of the double piping prohibition, the "imminent possibility of a collision" between the state's double piping prohibition and the FERC's certificate of public convenience would result in federal preemption of Nebraska's double piping prohibition.

NRC believes it preferable to avoid this result by obtaining a ruling from the Neb. P.S.C., construing the double piping prohibition as inapplicable to NRC's proposed service to LDCs as a matter of state law (which would preserve the State's interest in local state regulation of what will essentially be a local transportation entity, thereby avoiding the need for NRC to seek recourse under federal preemption principles).

In its orders under other double piping statutes, the Nebraska Commission has adopted the common dictionary definition of "redundant" to mean "exceeding what is necessary or normal: superfluous." *Application Nos. P-003, P-006, and P-007*. With respect to safety, the Nebraska Commission has expressed concern that duplicative piping in an area poses the potential to slow the response to a natural gas leak or emergency and increases the investigative

time to determine the cause or location of such a leak. However, with respect to economics, the Commission has acknowledged that limiting competition may not provide the consumer with the most cost-efficient choice. In the Matter of the Application of Metropolitan Utilities District, 2001 Neb. PUC LEXIS 163 (2001). Nevertheless, the Commission has expressed the desire to protect ratepayers from duplicative piping because the incumbent utility's costs must be spread over a smaller customer base if duplicate pipeline facilities are permitted to lure away existing customers of the incumbent utility. In the Matter of the Application of Metropolitan Utilities District, Application No. P-0005 (2002).

However, none of the considerations previously relied upon by the Commission or the apparent legislative purpose of the double piping prohibition supports application of the prohibition to *new* pipeline interconnects with an LDC.⁴ While acknowledging that the State of Nebraska has an interest in protecting incumbent LDCs from loss of customers in the LDC's service territory, and in preventing economically wasteful competition among LDCs and other intrastate suppliers in the state, the State of Nebraska has no public policy interest in preventing Nebraska LDCs:

- (a) from improving the reliability of the LDC's gas supplies (and thereby enhancing the reliability of the LDC's service to high-priority retail customers) through an interconnect with another pipeline supplier;
- (b) from accessing cheaper gas supplies (for the benefit of the LDC's retail customers) by connecting to a different interstate pipeline; or
- (c) in protecting the interstate pipeline currently serving the LDC from competition from other interstate suppliers.

⁴ It is noteworthy that the legislative history of the double piping prohibition makes clear that the prohibition was not intended to prevent large end users from constructing their own delivery lines to access a new source of gas supplies:

"What it doesn't mean is that if there's a large volume user who is capable of running their own pipe to somebody else's pipe, that in fact they can create a pipeline for themselves. Example of that would be NPPD, who wants a redundant line from where they are to a natural gas supply. They would be the only user. They wouldn't turn around and sell it. They wouldn't be in the marketplace. They would be, essentially, a high volume user, using it only for themselves. Fine. No problem. They're not in the marketplace and they're not subject to the double piping. It's not what we're after with that public policy."

Accordingly, the double piping prohibition should *not* preclude the Neb. P.S.C. from granting the Nebraska Resources Pipeline a certificate under section 53(1) of the SNGRA, Neb. Rev. Stat. § 66-1853(1) (2006), to serve LDCs in Nebraska.

REQUEST: Based upon the foregoing, NRC requests the Commission to affirm that Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), *does not apply* to a new pipeline interconnect to an LDC already served by an interstate pipeline.

3. Does the Commission have jurisdiction over an Application for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

An Application by NRC for a Certificate of Public Convenience under section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska would be a matter of first impression in the State. The question has therefore been posed whether a pipeline such as that proposed by NRC falls within the intended scope of the SNGRA certification procedure. In order to make an informed decision on the appropriate regulatory forum (FERC vs. the Nebraska P.S.C.) before which to file its Application, NRC requests a determination by the Commission that the certification requirements and rate regulation provisions of the SNGRA do apply to the proposed NRC Pipeline and that, if filed, the Commission will act upon NRC's Application.

To determine the scope of the Neb. P.S.C.'s certificate jurisdiction, the SNGRA must be construed as a whole. Specifically, certification provisions of section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), must be evaluated in light of section 56 of the SNGRA, NEB. REV. STAT. § 66-1856 (2006), and the definitions set forth in section 2 of the SNGRA, NEB. REV. STAT. § 66-1802 (2006).

Under section 53(1) of the SNGRA, "no jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the commission that public convenience will be promoted by the transaction of the business and permitting the applicants to transact the business of a jurisdictional utility in this state." SNGRA § 53(1), NEB. REV. STAT. § 66-1853(1) (2006). On the other hand, section 56 allows "jurisdictional utilities" to construct new facilities without obtaining prior certification. SNGRA § 56, NEB. REV. STAT. § 66-1856 (2006). Giving meaning to section 53(1) requires that that section be read as granting the Neb. P.S.C. certificate authority over new "natural gas public utilities," while section 56 gives "jurisdictional utilities," (*i.e.*, those that have already been certified as serving the public convenience or that were "grandfathered" under section 53(2) of the SNGRA, NEB. REV. STAT. § 66-1853(2) (2006), as jurisdictional utilities in operation on enactment of the SNGRA,) the right to construct new facilities without being required to obtain certification of the new facilities from the P.S.C.

The interplay between sections 53(1) and 56 leads to the conclusion that as a Hinshaw pipeline and, therefore, an "intrastate" pipeline for purposes of the SNGRA, the NRC Pipeline

would be initially classified as a "natural gas public utility" under the SNGRA, until certified as a "jurisdictional utility" by the Neb. P.S.C. under section 53(1). Accordingly, NRC must apply for a certificate of public convenience under section 53(1) of SNGRA to be classified as a jurisdictional utility prior to "transact[ing] . . . business of a jurisdictional utility" in Nebraska. NEB. REV. STAT. § 66-1853(1) (2006).

In keeping with this analysis, NRC would not be a "jurisdictional utility" prior to receiving certification as such under section 53(1) and, implicitly, would not be permitted to commence construction of the NRC Pipeline prior to obtaining such certification from the Neb. P.S.C. Indeed, even without consideration of the interplay between section 53(1) and section 56, the "transaction of business as a jurisdictional utility" logically encompasses construction of pipeline transportation facilities, an activity in which NRC may not engage prior to receiving a certificate of public convenience from the Neb. P.S.C. as a "jurisdictional utility" under section 53(1) of the SNGRA.

REQUEST: Based upon the foregoing, NRC requests the Commission to affirm that the Commission possesses jurisdiction to consider an Application from NRC for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to local distribution companies and other customers.

C. CONCLUSION

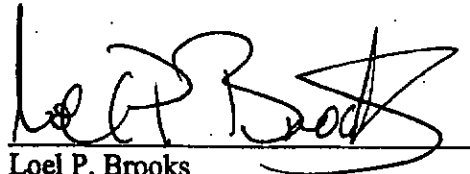
For the reasons set forth above, NRC requests the Commission to investigate the jurisdictional issues identified in this letter and to expeditiously rule that:

1. LDCs are *not* "high-volume ratepayers" within the meaning given such term under section 2(7) of the SNGRA, NEB. REV. STAT. § 66-1802(7) (2006);
2. Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), *does not apply* to a new pipeline interconnect to an LDC already served by an interstate pipeline; and
3. The Commission *has* jurisdiction over an Application for a Certificate of Public Convenience under section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers.

Respectfully Submitted,

NEBRASKA RESOURCES COMPANY, LLC

Andrew S. Pollock
July 16, 2007
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Loel P. Brooks
Brooks, Pansing Brooks, PC, LLO
1248 O Street, Suite 984
Lincoln, Nebraska 68508
(402) 476-3300
lbrooks@brookspanlaw.com

William F. Demarest, Jr.
Douglas Law
Blackwell Sanders LLP
750 17th Street, N.W. Suite 1000
Washington D.C. 20006
(202) 378-2300
wdemarest@blackwellsanders.com
dlaw@blackwellsanders.com

Attorneys for Nebraska Resources Company, LLC

cc: Dan Frey
Angela Melton
Laura Demman

Nebraska Resources Company L.L.C.

Presentation to Prospective Shippers

NOTE: This presentation is for informational purposes only. It does not represent an offer for goods or services. All information is subject to change without notice.

Nebraska Resources Natural Gas Pipeline

- Seminole Energy Services Overview
- Seminole Gas Company Overview
- Project Description
- Regulatory
- Construction and In Service Timeline
- Total Project facts & figures

Seminole Energy Services

Overview of the company

- Nebraska Resources Company LLC (NRC) is a wholly owned subsidiary of Tulsa based Seminole Energy Services LLC.
 - NRC, a Nebraska LLC, will construct and operate the pipeline.
- Seminole operates from the wellhead to the burner tip.
 - Seminole has operations in 13 states conducting producer services, gathering, processing, treating, and wholesale & retail gas marketing.
- Strong Financial Backing Combined with Consistent Growth and Performance
 - Book assets of over \$300mm. This allows for substantial credit facilities when called upon.
 - Seminole recently received \$55mm in outside investment from The Stephens Investment Group.
 - \$1.37 billion and \$1.25 billion in revenue for 2006 and 2005.
- Strong Executive Leadership and a Broad Knowledge Base
 - Seminole's executive team averages over 20 years experience in the energy industry.
 - Seminole has over 150 employees with offices in Tulsa, Denver, Dallas, Chicago and Detroit
 - Seminole has developed significant marketing and customer relationships in Nebraska through sales to thousands of commercial, industrial, and agricultural accounts on the Kinder Morgan System.

Seminole Gas Company

- ❑ Seminole Gas Company is Seminole Energy's mid-stream subsidiary.
- ❑ Seminole Gas has ownership in 11 gas processing facilities. 8 of these are operated by Seminole.
- ❑ Seminole Gas Operates over 400 miles of gathering pipe.
- ❑ Seminole's systems gather, treat and process over 320 MMcf/day.
- ❑ Seminole's in house engineers have extensive experience in laying and operating natural gas pipelines.

Nebraska Resources Pipeline Project Description

- ❑ A regulated natural gas pipeline designed to serve Aquila's local distribution systems, various ethanol facilities and other large use customers within the state of Nebraska.
- ❑ 130+ miles of 4-20 inch diameter steel pipeline originating at a Trailblazer Pipeline location.
- ❑ Full project cost of \$40 - \$70 million predicated upon firm commitments from Aquila and other customers.
- ❑ In service date of early 2009 for southern delivery points, with full pipe in service by 3/31/2009.
- ❑ Provides ethanol projects with significant long term secured transportation and supply alternatives as well as needed competition.

Nebraska Resources Project

Regulatory Process

- The regulatory approval process will be a two phase process involving both the FERC and the Nebraska PSC.
- At the Initial phase, NRC will seek regulatory approval from the Nebraska PSC to construct a pipeline to serve the LDC load in Nebraska.
- The Nebraska PSC will have jurisdiction over the LDC load.
 - However, NRC will still be able to construct the pipeline to a capacity that will serve both the LDC load and the Non-LDC load.
 - This process is expedited when compared to a full FERC 7(C) construction certificate filing. 6-9 months vs. 18-22 months.
- After Construction, NRC may seek limited FERC Regulatory approval for the Non-LDC load on the pipe.
 - This procedure is also expedited because the certificate provided will only be one for operation of the pipeline and not for construction.
 - Once approved by FERC, FERC will have jurisdiction over the Non-LDC load.

Anticipated Zone Rates

- ☐ The following are the likely zones & rates that will appear in the open season precedent agreements.
- ☐ Alternate rates are possible for larger shippers located in the southern zone.
- ☐ This is not an offer, but a representation of the possible zones and rates. The completed zones and rates will be published when the Official Open Season begins. Rates will not be final until approved by a regulatory authority
- ☐ Zone 1
 - Trailblazer Pipeline interconnect in Clay County, NE to Shelby, Nebraska. This zone will include areas around York, Nebraska.
 - FT rate of \$0.43/mmbtu
- ☐ Zone 2
 - The end of zone 1 to Columbus and Schuyler, Nebraska.
 - FT rate of \$0.68/mmbtu
- ☐ Zone 3
 - The end of Zone 2 to Norfolk, Nebraska.
 - FT rate of \$1.03/mmbtu

Facts & Figures

- ❑ NRC will investment \$40 – \$70 million dollars.
- ❑ Design Capacity will run between 60,000 and 80,000 mcf/d.
 - The pipe is designed to operate without compression and have significantly lower variable costs than competing pipelines.
- ❑ Final design capacity is predicated on the results of the open season and the finalizing Firm Transportation agreements